

ENTERED

SEP 30 1997

**L.A.B.
DEPUTY CLERK**

IN RE:

BHB ENTERPRISES, LLC, d/b/a
Tycoon's Gallery of Games,

DEBTOR.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

at _____ O'clock & _____ min _____ PM

FILED

SEP 30 1997

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (4)

Case No. 97-01975-JW

Chapter 11

JUDGMENT

Based upon the findings as recited in the attached Order of the Court, the Trustee's Motion
to Sell Free and Clear of Liens pursuant to 11 U.S.C. § 363 is granted.

September 30, 1997
Columbia, South Carolina


UNITED STATES BANKRUPTCY JUDGE

1634

ENTERED

SEP 30 1997

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DEPUTY CLERK

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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IN RE:)

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Tycoon's Gallery of Games,)

DEBTOR.)
_____)

Case No. 97-01975-JW

Chapter 11

**ORDER GRANTING TRUSTEE'S MOTION TO SELL
PROPERTY FREE AND CLEAR OF LIENS**

This matter is before the Court on the motion of Stanley H. McGuffin, Esq., as Chapter 11 Trustee for the debtor BHB Enterprises, LLC ("Trustee"), seeking an Order Authorizing Sale of Assets Free and Clear of All Liens, Encumbrances, and Other Interests Pursuant to 11 U.S.C. § 363(b)(1) and (f), ("Sale Motion"), and Notice of Sale of Property Free and Clear of Liens ("Notice"), each filed on August 29, 1997. After reviewing the pleadings in this matter, the supporting memorandum of the Trustee filed August 29, 1997, the Trustee's Bench Memorandum in Support of the Sale Motion filed September 24, 1997, the arguments of counsel for the parties, and the testimony and exhibits proffered by the Trustee, the Court makes the following Findings of Fact and Conclusions of Law¹:

FINDINGS OF FACT

1. Trustee proposes to sell, pursuant to 11 U.S.C. § 363(b)(1) and (f)², outside the

¹ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

² Further reference to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

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ordinary course of business, all physical assets (both real and personal)³ of the debtor BHB Enterprises, LLC ("Debtor"), located at 1900 Highway 17 North, Surfside Beach, South Carolina, including, but not limited to, the list of assets more particularly described in Exhibit A to the Notice (collectively "Physical Assets"), as well as all rights of the estate to the use of the trade name "Tycoons."

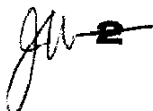
2. The Notice and Sale Motion were served on all creditors claiming an interest in or lien on the Physical Assets and all other creditors and interested parties on August 29, 1997, as evidenced by the Certificates of Service filed with the Court. The Court finds that all parties had sufficient notice of the sale, and ample opportunity to object or bid in response to the Notice and Sale Motion.

3. Objections to the Notice and Sale Motion were due September 18, 1997. Timely objections to the Notice were filed by the following entities:

- a. South Carolina Department of Revenue ("Department of Revenue");
- b. Robert Horvath ("Horvath");
- c. South Carolina Workers Compensation Uninsured Employees Fund ("Fund");
- d. Certain creditors of the Debtor known as the "Petitioning Creditors"; and
- e. United States Trustee.

4. Objections to the Notice and Sale Motion were also filed by Bobby's Bar B-Q ("Bobby's") and Norman Barman ("Barman"). Although these objections were not filed timely, this Court heard and considered the arguments of counsel for Bobby's and Barman.

³ Cash, accounts receivable, and claims and/or causes of action for the recovery of assets are **not** included among the assets to be sold. Also **excluded** are a cash dispensing machine and a COMDATA check dispensing machine located on the premises. A legal description of the Real Property involved in the sale was set forth in the Sale Motion and is also contained in Exhibit 1 to this Order.



5. No Objection to the Notice and Sale Motion was filed by the three (3) lessors of video gaming equipment, Northcoast Capital Lease/Manifest ("Manifest"), Colonial Pacific Leasing Corporation ("Colonial"), and Granite Financial ("Granite").

6. At the hearing, counsel for the Trustee advised the Court that the designated purchaser identified in the Sale Motion, Carolina Equities, LLC or its assignee, had withdrawn its initial offer to purchase the Physical Assets after completing its due diligence investigation. However, Carolina Equities, LLC appeared at the sale hearing through its representative, Michael J. Newell, and indicated a desire to participate in the auction process.

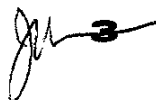
7. The Trustee first offered the Physical Assets for sale in open court on the terms contained in the Notice, but he did not receive any bids.

8. Open bidding was then conducted, resulting in a primary bid of Carolina Equities, LLC or its assignee/designee for \$775,000.00 cash ("Purchaser"), and a back up bid of Turner Gaming Organization ("Turner Gaming") for \$400,000.00 cash plus \$600,000.00 in a secured note with level, amortized payments over 36 months.

CONCLUSIONS OF LAW

I. Property of the Estate.

Sales of property under 11 U.S.C. § 363(b)(1) and (f) are limited to sales of property of the estate. *In re Charles F. Hudson, d/b/a Hudson Metal Works*, 94-73924-W (Bankr. D.S.C. January 10, 1997) (unpub); *In re Taylor*, 198 B.R. 142, 158 (Bankr. D.S.C. 1996). Thus, prior to allowing the sale, the Court must first determine whether the Physical Assets are property of the estate. The Trustee proffered testimony and evidence contained in documents in support of the Trustee's argument that the Physical Assets were property of the estate. Barman and the other parties in interest were given the opportunity to challenge and refute the proffer, but failed to do so and failed



to proffer any contradictory testimony. Therefore, based on the proffered testimony of the Trustee and the evidence submitted the Court, to which no objections were raised, *the Court finds that the Physical Assets are property of the estate for purposes of the sale.*

II. Pre Confirmation Sale.

Trustee seeks the Court's authorization to sell the property pursuant to 11 U.S.C. § 363(b)(1), outside the ordinary course of business prior to filing a plan of reorganization. Barman objected to the proposal to sell the Physical Assets, on the grounds that the proposed sale was premature. Although sales are usually proposed and conducted pursuant to a plan of reorganization, this Court *has recognized that when a sound business justification exists, the Court may authorize a sale pursuant to 11 U.S.C. § 363(b)(1) without a confirmed plan of reorganization. In re Taylor*, 198 B.R. at 156-57; *see also Stephens Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986); *In re WBQ Partnership*, 189 B.R. 97 (Bankr. E.D. Va. 1995).

Under the sound business purpose test, the Trustee has the burden of proving that:

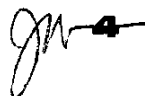
- A. sound business reason or emergency justifies a pre-confirmation sale;
- B. the sale has been proposed in good faith;
- C. adequate and reasonable notice of the sale has been provided to interested parties; and
- D. the purchase price is fair and reasonable.

In re Taylor, 198 B.R. at 157.

The Trustee proffered testimony regarding each of the four elements of the sound business purpose test, as follows:

A. Sound Business Purpose.

Since May 23, 1997, Trustee has been successfully operating the Debtor's business and generated net revenues of approximately \$75,000.00 for the benefit of the estate and its creditors. However, the licenses necessary to operate the gaming machines expire on October 1, 1997. The



cost of purchasing new licenses for each of the 65 machines (which licenses would be valid until May 31, 1999) would be approximately \$3,333.00 per machine, or \$216,645.00. Although the Trustee is successfully operating the business and generating a respectable amount of revenue, the estate lacks sufficient funds to purchase the necessary licenses, even for a reduced number of machines, and still maintain adequate operating capital and continue to operate profitably in accordance with existing regulatory requirements of the Department of Revenue.

If the sale is not approved, the Trustee would be forced to close the business on October 1, 1997 and commence liquidation of the assets. The revenue generated by the Trustee's operations, while sufficient to maintain the day to day operations of the Debtor, is wholly insufficient to pay all creditors of the estate in full. Under the sale as proposed, in addition to the assets retained by the Trustee, the Trustee anticipates being able to pay a substantial portion of all allowed, non-insider claims in full. Were the Trustee forced to conduct a liquidation sale of the assets, the return to the estate would result in a substantially less return to creditors of the estate. Furthermore, the sale price of the business as a going concern will likely generate substantially more revenue than a liquidation sale.

In addition to the license termination issue, Trustee has taken great steps to advertise the Debtor's business to cultivate a willing buyer. Trustee presented the Court with at least one bidder who is ready, willing, and able to purchase the Physical Assets immediately for cash equivalent to the approximate fair market value of the assets.

B. Good Faith.

The Court finds that the sale of Debtor's Physical Assets was proposed in good faith. The primary bidder and backup bidder, Carolina Equities, LLC and Turner Gaming, respectively, are

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third parties, arm's length entities that have made substantial, competitive offers for the Physical Assets. The Court finds that each of the bidders is a good faith purchaser, pursuant to § 363(m).

C. Notice.

The Court finds that adequate and reasonable notice of the proposed sale was given to all parties in interest. As evidenced by the Certificate of Service filed with the Court, the Notice and Motion were served on all creditors, lienholders and parties in interest on August 29, 1997, which was 26 days before the scheduled hearing. All parties have received adequate notice of the proposed sale. Any party who desired to file an objection or comment on the proposed sale had ample notice of the proposal, and opportunity to do so.

The Court further finds that it is not necessary to re-notice the sale under the new terms which differ partially from those contained in the Notice. The Notice originally served on all parties indicated that the purchase price might be reduced following the initial purchaser's due diligence period. In fact, such has happened.

D. Purchase Price.

The Court finds that both the purchase price offered by Purchaser, as well as the backup bidder, are fair and reasonable. Trustee has conducted a thorough investigation of the Debtor and the Physical Assets, and believes that the offer is fair and reasonable relative to the estimated value of the Physical Assets. In addition, Trustee has advised the Court that he anticipates the sale proceeds will pay a substantial portion of the costs of administration and valid claims against the estate.

The proposed sale satisfies all of the four elements of the sound business purpose test. Therefore, Trustee requests that the Court authorize the preconfirmation sale. The Court finds that

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the proposed sale meets all the requirements of the sound business purpose test, and therefore overrules Barman's objection.

III. Bona Fide Dispute.

Section 363(f)(4) provides that:

The Trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate only if--
...

(4) such interest is in bona fide dispute;

11 U.S.C. § 363(f)(4). To determine whether a sale is proper pursuant to § 363(f)(4), the Trustee must show: (1) that the entity holds an "interest" in the property; and (2) that the interest is in bona fide dispute. *In re Taylor*, 198 B.R. at 161.

The Bankruptcy Code does not define the term "interest." Recently, this Court has cited with approval case law stating that, "the term 'interest' is broad, covering more than just liens . . . the term 'interest' extends beyond liens." *See In re Taylor*, 198 B.R. at 161 (citing *In re WBQ Partnership*, 189 B.R. at 105.).

In addition to not defining the term "interest," the Code does not define the term "bona fide dispute." However, this Court has recognized that whether an interest is in bona fide dispute depends on:

[W]hether there is an objective basis for either a factual or legal dispute as to the validity of the asserted interest. This standard does not require that the Court resolve the underlying dispute or determine the probable outcome of the dispute, but merely whether one exists. . . . However, not any dispute satisfies the subsection. It clearly entails some sort of meritorious, existing conflict.

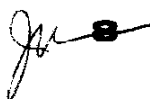
In re Taylor, 198 B.R. at 162 (citations omitted); *see In re Atlas*, 986 F.2d 709 (4th Cir. 1993); *In re Collins*, 180 B.R. 447 (Bankr. E.D. Va. 1995).



To support the claim that there are interests in bona fide dispute, Trustee must present the Court with factual evidence to show that an "objective basis" exists for the dispute. *In re Taylor*, 198 B.R. at 162; *see In re Collins*, 180 B.R. at 452. Barman asserts an interest in the Physical Assets by virtue of that certain Land Sale Contract dated September 14, 1995 by and between Bobby's and "Norman Barman on behalf of a corporation to be formed" ("Land Contract"). However, at the hearing Barman failed to contest the Trustee's argument that his asserted interest in the Physical Assets was in bona fide dispute based upon the proffered testimony and exhibits. Therefore, the Court finds that the Trustee has met his burden of showing that the interest of Barman is in bona fide dispute. The Court further reiterates that Barman also elected not to refute or contest the Trustee's proffer of evidence that the Physical Assets were in fact assets of the estate as opposed to assets subject to his claimed interest. Consequently, the Trustee is permitted to sell the Physical Assets free and clear of the interest of Barman.

The Trustee advised the Court that he had settled the objections raised by other creditors with whom there exist bona fide disputes, as follows:

A. **Bobby's:** Trustee will pay Bobby's the sum of \$271,000.00 out of the proceeds at closing, plus \$10,000.00 in attorneys fees and the unpaid property taxes, for the purchase of the Real Property and personal property which was originally the subject of the Land Contract. Trustee will additionally escrow \$160,000.00, which represents the balance of the secured claim asserted by Bobby's; comprised of approximately \$5,000 related to the interest on the real estate portion of the Land Contract and the remainder related to personal property originally identified in the Land Contract ("Personalty"). Bobby's will execute a general warranty deed to the Trustee for the Real Property and a Bill of Sale for the Personalty. The real estate portion of the Physical Assets will be sold free and clear of Bobby's claimed interest and any interest of Bobby's in the Personalty

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will attach to the sale proceeds in escrow, with Bobby's claim to the sale proceeds to be resolved in the claims review and objection process.

B. South Carolina Department of Revenue: The objection filed by the Department of Revenue has been resolved by stipulation between the Trustee, the Department of Revenue and the Purchaser. In settlement of all outstanding violations of the Video Game Machines Act and its related regulations, against Debtor, the Trustee has agreed to allow the claim of the Department of Revenue for alleged regulatory violations in the amount of \$34,500 against the estate. Further, Purchaser has agreed that immediately upon consummation of the sale and taking possession of the Physical Assets, it will close six (6) of the fifteen (15) gaming rooms for a period of six (6) consecutive months. Purchaser may select the rooms to be initially closed, and may change its selection within the first thirty (30) days of the six (6) month closure period. In the event Purchaser violates this term of the sale, such violation may be punishable by contempt of court. Also, in the event Purchaser sells the subject premises during the six (6) month closure period, it shall inform the subsequent purchaser of the terms of this Order and the six (6) month closure penalty and shall provide such disclosure in any contract of sale executed during the six (6) month closure period. The Trustee and Purchaser further acknowledge that this sale shall not effect the police and regulatory powers of the State of South Carolina, Department of Revenue and the South Carolina Law Enforcement Division, or their ability to regulate video gaming or enforce closure penalties against the Purchaser or any subsequent purchaser pursuant to the terms of this Order. If for any reason the sale approved by this Order does not close, this Order shall not effect the police and regulatory powers as might be applicable to the Debtor or Trustee. Further, the representative of the Purchaser has made representations to the Court that it is not associated with, or owned in whole or in part by the Debtor or a principal of the Debtor. The Trustee has also represented that

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based upon his due diligence investigation of the Purchaser, it is not affiliated with the Debtor or its principals. In the event such representations are subsequently determined to be false, the Department of Revenue retains the right to pursue all violations and seek the maximum monetary and closure penalties allowed by law.

C. South Carolina Workers Compensation Uninsured Employees Fund: The Fund filed a proof of claim for \$150,000 for a contingent, unliquidated claim it may have against the estate on behalf of a former employee of the Debtor, Leonard Puccio ("Puccio Claim") and asserted in its objection that such claim may be secured by the assets of the estate. The Fund's lien, if any, will attach to the sale proceeds in escrow subject to the right of the Trustee to contest the secured status of the claim.

D. Video Gaming Lessors: The Trustee has possession of eighteen (18) Pot-O-Gold machines which are leased in the name of Universal Video, Inc. from Manifest, Colonial and Granite. Trustee asserts that: (i) the Debtor is the real party in interest under the "leases" for the video gaming machines; and (ii) the leases are disguised security agreements. *See Stanley H. McGuffin, Esq. v. Harold Barman, et al.*, Adversary Proceeding No. 97-80227. As none of the lessors filed an objection, the Physical Assets may be sold free and clear of their claimed interest and the claimed interest of Universal Video, Inc. However, a term of the proposed sale contained in the Notice and announced in open court is that the successful bidder retains the right prior to closing to seek to reach an agreement with the lessors for assumption of the leases for the subject machines. The machines will remain assets of the estate if the successful bidder cannot make such an agreement.

E. Horvath, Petitioning Creditors, Fund, and United States Trustee: The objections filed by these creditors related to Court approval of an upset bid fee contained in the original Notice

of Sale. Since the offer to purchase on which that Notice was based was withdrawn, there is no upset bid fee. These objections are therefore rendered moot.

Finally, the Trustee has advised the Court that Century Data Systems, which holds a perfected lien on a cash register system will be paid from the proceeds of the sale.

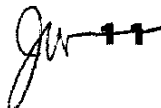
Based upon the foregoing findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the Trustee is authorized to sell, transfer and convey, *all right title and interest in the Physical Assets of BHB Enterprises, LLC* to the Purchaser ("Carolina Equities, LLC or its assignee/designee") free and clear of liens, claims and encumbrances pursuant to 11 U.S.C. § 363(b)(1) and (f). The interest or lien of any creditor or party in interest shall attach to the proceeds of sale.

AND IT IS SO ORDERED.

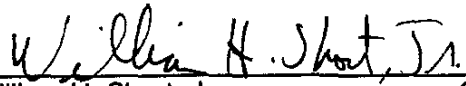
September 30, 1997
Columbia, South Carolina


UNITED STATES BANKRUPTCY JUDGE



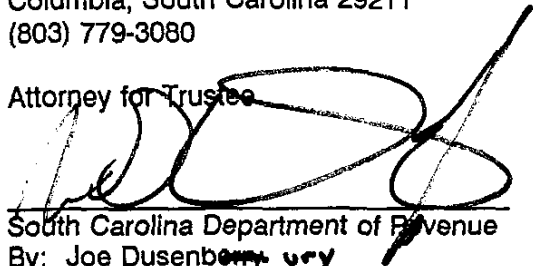
Consent Page for Trustee and Department of Revenue to Order Allowing Sale of Assets
Case No: 97-01975-JW

WE CONSENT:

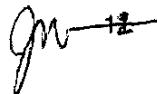


William H. Short, Jr. *SHM*
District Court ID # 3831
Post Office Box 11889
Columbia, South Carolina 29211
(803) 779-3080

Attorney for Trustee

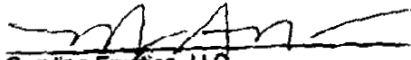


South Carolina Department of Revenue
By: Joe Dusenberry *JD*
District Court ID # 5197
Post Office Box 125
Columbia, South Carolina 29214



Consent Page for Carolina Equities, LLC to Order Allowing Sale of Assets

Case No: 97-01975-JW


Carolina Equities, LLC
By: Michael J. Newell
Its: President

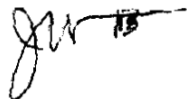


EXHIBIT 1 TO ORDER GRANTING
TRUSTEE'S MOTION TO SELL PROPERTY FREE AND CLEAR OF LIENS

Case No: 97-01975-JW

LEGAL DESCRIPTION OF REAL PROPERTY

ALL AND SINGULAR that certain piece, parcel or lot of land situated, lying and being in Socastes Township, Horry County, South Carolina, and being shown and designated as LOT SIX (6), SECTION A, on that certain map or plat of PLATT PLAZA prepared by S.D. Cox Surveyors, Inc., dated April 20, 1972, and recorded in Plat Book 53 at Page 38A, the Office of the Register of Mesne Conveyance for Horry County, which said map or plat and record thereof is hereby incorporated herein and made a part and parcel of this description by reference.

TMS No.	191-08-06-064
Street Address:	1900 N. 17th Avenue Surfside Beach, SC

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